STATE OF CALIFORNIA

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

PETE WILSON, *Governor*

September 13, 1994

VIA FEDERAL EXPRESS

94-105

Honorable William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20036

Re: PR File No. 94-SP3; Ex Parte Presentation

Dear Mr. Caton:

In accordance with 47 C.F.R. § 1.1206(a)(1), I am submitting herewith two copies of the attached enclosures.

On September 9, 1994, members of the Private Radio Bureau asked the California Public Utilities Commission ("CPUC") to provide further information concerning its Request for Proprietary Treatment of Documents Used In Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates in the above-referenced matter. The CPUC was also requested to provide copies of publicly available state administrative law judge rulings outlining a nondisclosure agreement arrangement governing information provided to the CPUC on a confidential basis by the cellular industry in a CPUC formal investigation of the cellular industry. Finally, the CPUC agreed to review its petition filed in the above-referenced matter in order to ascertain whether certain material redacted therefrom was otherwise publicly available.

The attached enclosures were provided in response to these requests.

Respectfully submitted,

Ellen S. LeVine
Principal Counsel

ESL:bjk

TRP/gab

94-105

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications.	))))	I.93-12-007

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING MOTION FOR MODIFICATION OF JULY 19, 1994 RULING

Administrative Law Judge (ALJ) ruling of July 19, 1994 granted the motions, in part, for confidential treatment of data submitted by certain cellular carriers (respondents)[1] in response to ALJ data requests in this proceeding. The ruling directed respondents to provide the confidential data to the Cellular Resellers Association (CRA) under a nondisclosure agreement.

On July 26 and 27, 1994, additional motions were filed by certain of the respondents requesting modification or clarification of the July 19 ALJ ruling. Still concerned over publicly disclosing certain data which the July 19 ruling deemed to be nonconfidential, certain respondents redacted the information described in Categories 1(b)(1), (2), and (3) on page 6 of the ruling from the copy provided to CRA. Categories 1(b)(1) and (2) concern data on the number of aggregate subscribers on each carrier's discount plans and basic rate plans, respectively. Category 1(b)(3) concern the number of aggregate subscribers of the company in total, broken down between wholesale and retail service.

The July 19 ruling designated this data nonconfidential since it disclosed only aggregate subscriber numbers, but not customer numbers on any single discount plan. Thus, competitors

1 Respondents filing separate motions include AirTouch Cellular (AirTouch), Bay Area Cellular Telephone Company (BACTC) McCaw Cellular Communications (McCaw), and US West Cellular (US West). Respondents filing joint include GTE Mobilenet (GTE), Fresno MSA, Contel Cellular, and California RSA No. 4.

would not be able to learn which particular discount plan(s) were more popular with subscribers with the intent of emulating them for competitive advantage. In lieu of disclosing this information, the respondents filed motions for modification of the ruling. The procedure for filing the motions was approved by the ALJ by phone call with certain carriers' representatives prior to the motions being filed.

On July 29, an interim ruling was issued temporarily staying the portions of the July 19 ruling for which respondents sought reconsideration, pending an opportunity for comment by other parties by August 3, 1994. The July 19 ruling also directed public disclosure of the percentages--as opposed to specific numbers of customers--applicable to the various categories of data cited in parties' motions. This ruling grants the motions of the respondents for reconsideration, as noted below.

Positions of Parties

Respondents request that the Commission treat the information in categories 1(b)(1), (2), and (3) of the July 19 ruling as confidential, and that the ruling be revised accordingly. Respondents argue that if this data is not kept confidential, competitors will have sufficient information to fully and accurately calculate the market share of the respondent providing the data, and use such information to the competitive harm of the party providing the data.

Although the July 19 ruling provided for only the number of aggregate subscribers to be publicly disclosed, respondents contend that even the types of aggregate data called for by the ALJ ruling are of so specific as to render them very valuable to competitors who could use them to analyze the carrier's business operations. Disclosure of such information to competitors would allow them to tailor their marketing plans in response to the carrier's subscribership pattern. A competitor may also structure an advertising sales message claiming superiority over the carrier

based on total subscribers or number of subscribers by a specific customer segment or growth rate of total subscribers.

On August 3, two parties, Cellular Carriers' Association of California (CCAC) and CRA filed responses to the July 26/27 motions. CCAC supports respondents' motions. CCAC contends that any inadequate showing of competitive harm in the initial motions has since been remedied by the justifications provided in the motions for modification. According to CCAC, "imminent and direct harm" would result from disclosure of the disputed customer information to competitors who could then use it to tailor their own discount plans and marketing strategies accordingly. CCAC asserts that no competitor should be compelled to divulge to its competition what amounts to a blue print of its subscriber area strengths and weaknesses. CCAC also disputes that public disclosure of the disputed data promotes a "fully open regulatory process" since only cellular carriers--and not other wireless service providers--are being compelled to disclose sensitive data. CCAC submits that it is unfair to require such disclosure from some providers and not others, and that compelling such disclosure will compromise the healthy competition which the Commission seeks to foster.

CRA opposes the motions for modification of the July 19 ALJ ruling, and argues that there has been no showing of "imminent and direct harm of major consequence" from disclosure of the data. CRA observes that not all the carriers have objected to provide the requested data in aggregate form. For example, California RSA #2 provided the data to CRA without complaint. Likewise, Los Angeles Cellular Telephone Company (LACTC) did not object to providing the noted data. CRA also disputes, in particular, US West's claims of competitive harm, noting that US West has announced a joint venture with its San Diego duopoly competitor, AirTouch. CRA also contends that mere knowledge of aggregated subscriber information would not be usable by competitors to gain any advantage over carrier making

the disclosure since the subscriber would not know which plans subscribers are utilizing.

Discussion

As stated in the earlier July 19 ruling, the standard for ruling on parties' motions for confidential treatment is whether public disclosure would cause "imminent and direct harm of major consequence." The risk of such harm is to be balanced with "the public interest of having an open and credible regulatory process." (In Re Pacific Bell 20 CAL PUC 237, 252). Examples of information considered to cause such harm includes customer lists, prospective marketing strategies, and true trade secrets.

It is concluded that based on the additional explanation presented by respondents, in their motions of July 26/27, the data referenced in categories 1(b)(1), (2), and (3) of the July 19, 1994 ALJ ruling should be restricted from public disclosure and treated confidentially. Parties may still obtain access to this confidential data, but only through execution of an appropriate nondisclosure agreement.

As explained by the July 26/27 motions, however, the problem of significant competitive harm is not eliminated merely by requiring the data to be disclosed in the aggregate. Even though in aggregate form, the disclosure of absolute numbers would still reveal the relative market shares of each respondent in each of the service areas identified in the original ALJ data request. Knowledge of market share could be used by a competitor to structure an advertising message claiming superiority over the carrier, based on total subscribers. If a competitor knew a carrier's specific number of subscribers by market area applicable to the various categories referenced in the July 19 ruling, it could assess the carrier's strengths and weaknesses and adjust its marketing strategy accordingly.

The only party to file an objection to respondents' motions was CRA. As one reason for its objection, CRA cites the

fact that at least two carriers, California RSA #2, Inc. and LACTC did not object to providing the data on aggregate numbers of customers. The willingness of these carriers to publicly disclose the data for their own operations does not, of itself, prove that similar disclosure by other carriers would not cause them competitive harm. The basis for deciding the motions at issue are the claims of competitive harm that would result for those carriers who did file motions. There is no basis to speculate regarding why other carriers chose for whatever reason not to object to releasing various forms of data. On this basis of the filed motions, the carriers have provided adequate justification.

CRA also cites the announcement of a joint venture between US West and its only duopoly competitor, AirTouch as additional evidence justifying public disclosure of the data. According to CRA, US West's position amounts to nothing less than AirTouch can have this competitive information, but the public or any other competitor cannot. Thus, CRA appears to concede that the information has competitive value, but seeks to have it publicly disclosed anyway so all prospective competitors can have equal opportunity to competitively benefit from the information, not just AirTouch. By advancing this argument, CRA actually lends credence to carriers' arguments that the data does, in fact, have commercially sensitive value to competitors. The fact that US West voluntarily decides to share certain data with AirTouch in connection with a joint venture is its proprietary right. It does not follow that US West should be required to disclose commercially sensitive data to other competitors with whom it has no joint venture interests.

As a final argument, CRA claims that since the data would only disclose aggregated numbers, it cannot be construed to be a "trade secret." Since the aggregated data would not disclose which billing plans a subscriber utilized, CRA argues that a competitor would not be able to use the data for competitive gain.

Yet, the additional arguments presented by the carriers show that there is an economic value in knowledge of the aggregate number of subscribers to the extent it indicates a carrier's market share in particular market areas and total number of subscribers on discount plans in given market areas. Such information can be reasonably classified as "trade secrets." As defined under the Uniform Trade Secrets Act, codified in the California Civil Code, § 3426 et seq., a "trade secret" is:

> "information ....that derives independent economic value, actual or potential, from not being generally known to the public...and that is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Accordingly, to the extent the information on numbers of subscribers has significant economic value to competitors, it can properly be considered as "trade secrets" under the Uniform Trade Secrets Act. In the interests of promoting a more competitive market, carriers should be allowed to protect the confidentiality of such competitively sensitive information.

Procedures for Third-Party Access to Carriers' Data Responses

In its motion, BACTC also requests that the Commission clarify the procedure to be followed for making non-confidential data available to the public while preserving the confidentiality of information deemed proprietary under General Order (GO) 66-C. BACTC notes that although the ALJ ruling establishes a procedure to provide the publicly available information in the data request to CRA, no procedure was explained whereby the non-confidential data is to be made available to other parties. BACTC proposes that all data produced in response to the ALJ rulings of April 11, 1994 and April 22, 1994 be physically segregated from the public documents in the formal proceeding files. BACTC also proposes that parties go through the respective carriers to request access to the data responses.

No other party commented on BACTC's proposal as to procedures for Commission custody of the data, and third-party access. BACTC's request for clarification of procedures for providing data to third parties is addressed in the ruling below.

IT IS RULED that:

1. The motions of the respondents to modify the July 19, 1994 ruling are granted with respect to the confidentiality of information designated as categories 1(b)(1) (2), and (3) in the July 19 ruling as described above.

2. The July 19, 1994 ruling is revised as follows: The information on aggregate numbers of subscribers indicated in categories 1(b)(1), (2), and (3) of the ruling shall be subject to the confidentiality provisions of GO 66-C and Public Utilities Code § 583, applicable to those respondents filing motions for reconsideration.

3. This confidential information shall be provided to CRA pursuant to the nondisclosure agreement as explained in the July 19 ruling.

4. Any party, other than CRA, interested in obtaining a copy of the redacted version of the data responses provided by the carriers in this proceeding shall directly contact the respective carriers to obtain such copies, not Commission staff.

5. The carriers shall promptly provide to any party who makes a specific request, a copy of all redacted data responses produced by carriers in this proceeding.

6. Any party, other than CRA, interested in obtaining a copy of the unredacted confidential version of the data responses provided by the carriers in this proceeding shall do so by contacting the respective carriers and executing a nondisclosure agreement as prescribed in the July 19 ruling. Confidential copies shall not be available through the Commission.

Dated August 8, 1994, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Motion for Modification of July 19, 1994 Ruling on all parties of record in this proceeding or their attorneys of record.

Dated August 8, 1994, at San Francisco, California.

/s/ GABRIELLE NGUYEN
Gabrielle Nguyen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number of the service list on which your name appears.

Historical Note

Derivation: Stats.1915, c. 91, p. 131, § 28.

Cross References

Production of out of state records, see § 313.

Notes of Decisions

1. Construction and application

It is necessary for the public authorities whose duty it is to regulate public utilities to have a complete disclosure of all the affairs of such utilities, and it is advisable, from the standpoint of the utility, to have such information at hand concerning its own business as will be designated to aid public authorities in according fair treatment. Mt. Whitney P. & E. Co. v. Tulare Co. P. Co. et al. (1912) 1 C.R.C. 285.

§ 583. Information confidential; disclosure of information; misdemeanor

No information furnished to the commission by a public utility, except such matters as are specifically required to be open to public inspection by the provisions of this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

(Stats.1951, c. 764, p. 2047, § 583.)

Historical Note

Derivation: Stats.1915, c. 91, p. 131, § 28.

Library References

Records ⇐14. C.J.S. Records § 35 et seq.

Notes of Decisions

1. In general

Coded information from the background data of staff reports entered in evidence in minimum rate proceedings should be made available for cross-examination purposes by the commissioner or hearing examiner upon proper showing of a compelling need, but should coding foreclose interested parties from obtaining essential material information may be furnished even though the source of such material must be identified. Petition of Anderson Clayton Co. (1968) 68 Cal.P.U.C. 21.

§ 584. Annual report to commission; monthly report of earnings and expenses; special reports

Every public utility shall annually furnish a report to the commission at such time and in such form as the commission may require in which the utility shall specifically answer all questions propounded by

Notes of Decisions

Investigations 2
Validity 1

1. Validity

Since proceedings under § 11180 et seq. relating to investigations by heads of government departments do not relate to judicial proceedings but to statutorily permitted investigations, the proceedings are not constitutionally invalid because they fail to follow C.C.P. §§ 1985, 2035, which apply to proceedings of judicial nature. Fielder v. Berkeley Properties Co. (1972) 99 Cal.Rptr. 791, 23 C.A.3d 30.

2. Investigations

California attorney general's investigation into possible antitrust violations affecting California in marketing of natural gas originating in Alaska had both interstate and intra-California aspects, and thus while conducting investigation attorney general properly may be concerned not only with possibilities of prosecution in California courts but also with formulations of enforcement policy in cooperation with federal authorities and with recommendations for remedial administrative rulings and legislation, as this section, which empowers attorney general to investigate any subject under his department's jurisdiction, surely empowered attorney general to gather information that was "not plainly incompetent or irrelevant to" those purposes. Younger v. Jensen (1980) 161 Cal.Rptr. 905, 605 P.2d 813, 26 C.3d 397.

Gen. Laws Supp.1939, Act 8780d, lodging with employment commission duty to administer Unemployment Insurance Act, and specifically imposing upon commission duty to do all things reasonably necessary to enforce provisions thereof including power to issue process to compel attendance of witnesses and production of records, necessarily implied investigatory powers. Hill v. Brisbane (1944) 151 P.2d 578, 66 C.A.2d 15.

Under this section and § 11181, director of state department of social welfare has authority to investigate and hold hearings to determine whether unauthorized persons have been engaged in child placement. 23 Ops.Atty.Gen. 35 (1954).

§ 11180.5. Unlawful activities; assistance in conducting investigations

At the request of a prosecuting attorney or the Attorney General, any state agency, bureau, or department may assist in conducting an investigation of any unlawful activity which involves matters within or reasonably related to the jurisdiction of such agency, bureau, or department. Such an investigation may be made in cooperation with the prosecuting attorney or the Attorney General.

(Added by Stats.1977, c. 891, p. 2670, § 1.)

Library References

Administrative Law and Procedure ⇐341. WESTLAW Topic No. 15A.

C.J.S. Public Administrative Law and Procedure §§ 76, 78.

§ 11181. Powers in connection with investigations and actions

In connection with these investigations and actions, the department head may:

(a) Inspect books and records.

(b) Hear complaints.

(c) Administer oaths.

(d) Certify to all official acts.

(e) Issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding pertinent or material thereto in any part of the state.

(f) Divulge evidence of unlawful activity discovered, pursuant to this article, from records or testimony not otherwise privileged or confidential, to the Attorney General or to any prosecuting attorney who has a responsibility for investigating the unlawful activity discovered, or to any governmental agency responsible for enforcing laws related to the unlawful activity discovered.

(Added by Stats.1945, c. 111, p. 439, § 3. Amended by Stats.1981, c. 778, p. 3035, § 1; Stats.1987, c. 1453, § 8.)

Historical and Statutory Notes

The 1981 amendment added subd. (f) relating to divulging evidence of unlawful activity.

The 1987 amendment, in subd. (f), added "or to any governmental agency responsible for enforcing laws related to the unlawful activity discovered."

Derivation: Pol.C. § 353, added by Stats. 1921, c. 602, p. 1023, § 1.

Cross References

Administration of oaths and affirmations, see Code of Civil Procedure § 2093 et seq.

Code of Regulations References

Depositions, proceedings before the occupational safety and health appeals board, see 8 Cal. Code of Regs. § 372.3.

Law Review Commentaries

Fair procedure in welfare hearings. David R. Packard (1969) 42 So.Cal.L.R. 600.

Library References

Administrative Law and Procedure ⇐356.
Witnesses ⇐1.
WESTLAW Topic Nos. 15A, 410.
C.J.S. Public Administrative Law and Procedure § 81.
C.J.S. Witnesses § 2 et seq.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

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1. Validity

There is no constitutional objection to a system under which heads of departments of government may compel production of evidence for purposes of investigation without instituting formal proceedings against one from whom evidence is sought or filing any charges against him, but department heads cannot compel production of evidence in disregard of privilege against self-incrimination or constitutional provisions prohibiting unreasonable searches and seizures. Brovelli v. Superior Court of Los Angeles County (1961) 15 Cal.Rptr. 630, 364 P.2d 462, 56 C.2d 524; Fielder v. Berkeley Properties Co. (1972) 99 Cal. Rptr. 791, 23 C.A.3d 30.

2. Investigations

Defendants were subpoenaed pursuant to California attorney general's delegation of authority to conduct investigation into ownership, production, sale and distribution of Alaska natural gas insofar as it affected California to determine existence, nature, and scope of violations of federal and state antitrust laws pertaining to price-fixing, monopolization, division of markets, and restraint of trade, and that clearly was within attorney general's overall authority to investigate matters relating to subjects under his jurisdiction, since possible antitrust violations were subjects under his jurisdiction. Younger v. Jensen (1980) 161 Cal. Rptr. 905, 605 P.2d 813, 26 C.3d 397.

Investigation by head of department of government relating to subjects under jurisdic-

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3. Production of documents

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a value of in 1989 to a value of in 1993, indicating the duopolists are gradually eliminating any competition that might have existed in the retail market.

D. Cellular Pricing

The CPUC examined the prices offered by facilities-based cellular carriers to determine if price levels and price changes were consistent with what we would expect in a competitive market. In this analysis of prices, the CPUC recognizes the proliferation in recent years of various promotional contract plans which purport to offer savings to targeted customer segments. These plans usually require eligible customers to accept various restrictions and conditions, as contrasted with traditional "basic service" plans, which may entail a higher nominal rate but which do not require the restrictions of the discounted plans.

We examined whether cellular rates have changed and whether rate changes by the duopolists are independent of each other. The CPUC has found the following:

- The average rate for the basic plan has remained unchanged in three markets, including California's largest market; increased in one market; and experienced decreases of less than 5 percent in the four other markets studied.

- Facilities-based carriers' basic retail rates are nearly identical in Los Angeles and Santa Barbara and vary by less than 7 percent in all other markets with the exception of Sacramento.

Stagnant or slowly declining cellular rates must be evaluated in the context of lower costs. In real terms, the rates for basic plans in all markets have declined by an average of 14.9 percent, in nominal terms by 0.8 percent. (See Appendix I)

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Operating expenses per subscriber have fallen by 47 percent in real terms from 1989 to 1993.[14] (See Appendix H) In addition, capital investment per cellular subscriber declined from $1,816 to $978 between June 1988 and June 1993.[15] This decline in operating and capital costs is expected in a young, growing industry that is gaining operational experience and possibly exploiting scale economies. Unfortunately, this decline in costs has not been accompanied by a commensurate decline in rates. In California the rate of growth has been on the average 34 percent for the major markets.

1. Method For Pricing Analysis

To examine pricing trends in the cellular market, the CPUC analyzed data on all pricing plans offered by the facilities based-carriers in the top five MSAs and two small RSAs for each year from 1989 through 1993.[16]

Generally, California cellular carriers offer a number of retail plans that differ

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[14] For the remainder of this petition we will repeat prices in nominal terms for two reasons: (1) we are uncertain which inflation rate is appropriate, and (2) we expect productivity to be increasing, as it has been in other telecommunications industries. In most other telecommunications markets, increases in productivity and competition have led to real price reductions. For example, the telecommunications Consumer Price Index ("CPI") has increased by 4.6 percent, while the general CPI has increased by 14.2 percent.

[15] Cellular Telephone Industry Association, Mid-Year Data Survey, October, 1993, as cited in Attachment 3, footnote 4 of Cellular Service, Inc.'s Opening Comments in the CPUC's I. 93-12-007.

[16] The areas studied are Los Angeles MSA, San Francisco-San Jose-Oakland MSA, Sacramento MSA, San Diego MSA, Santa Barbara MSA, Fresno MSA, California 2 RSA, and California 7 RSA.

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Carriers such as AirTouch, LACTC and US West, claim that they reduced rates following adoption of the CPUC's Rate Band Guidelines. The CPUC observes that such reductions were essentially temporary promotional inducements. As noted by Cellular Services, Inc. ("CSI") in the CPUC's ongoing investigation, AirTouch claims that prices were cut by a number of carriers in 15 separate filings under the 1993 Rate Band Guidelines; however, by March 1994 only two remained in effect. Similarly, LACTC asserts that it filed 34 price-cutting tariff filings to demonstrate increased rate reduction activity, but CSI maintains that only five of the filings actually reduced rates. Of 21 LACTC filings made under temporary tariff authority, only five involved rate reductions, and these were of a temporary nature. In addition, US West's wholesale two-year contract involves a cash-back program which is now the subject of an unfair business practices complaint by Utility Consumers Action Network (a California consumer advocate) pending before the CPUC. All of the plans require long-term commitments enforced by high termination penalties for changing service.

b. Duopolists' Basic Plan Rates

When cellular carriers first offered service, the majority of subscribers were sold cellular service on the basic plan. The basic plan is generally less restrictive than contract plans established in later years. As other plans have been introduced to a price-differentiated market, the basic plans' use has declined. In 1989, 72 percent of California cellular consumers in major markets were on the basic plan,

while in 1993 only 37 percent were on the basic plan.[22] Among small cellular markets studied by the Cellular Carriers Association of California, over 80 percent of subscribers in 1993 were on basic service plans.[23]

As shown in Appendix I, rates for basic plans for retail tariffs are nearly identical in Los Angeles and Santa Barbara, vary by less than 7 percent in San Francisco-Oakland-San Jose, San Diego, Fresno, RSA 7 and RSA 2, and vary by more than 10 percent only in Sacramento. Retail basic rates have fallen by less than 4 percent in nominal terms in California markets from 1989 to 1993. In Los Angeles, Sacramento and Santa Barbara rates have not fallen at all. In San Diego, San Francisco, Fresno, and RSA 2 basic retail rates have fallen by less than 4 percent in nominal terms. In RSA 7, due to the entry into the market in 1991 of a second carrier with higher rates than the incumbent carrier, average basic rates actually increased 1.5 to 5 percent during the 1989 to 1993 time frame.

In the Los Angeles market the facilities-based duopolists charge identical basic rates for all levels of use. The nominal rates have not fallen at all during the study horizon, from 1989 to 1993.

In the San Francisco-Oakland-San Jose MSA, basic rates offered by the facilities based carriers have only recently begun to diverge. GTE Mobilnet's reported nominal basic rates have not changed during 1989 to 1993, while

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[22]These percentages represent the share of customers who were on basic plans or their equivalents in Los Angeles, the San Francisco Bay Area, Fresno, Santa Barbara, San Diego, and Sacramento.

[23]Comments of Cellular Carriers Association of California in I.93-12-007.

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BACTC's nominal rates, both retail and wholesale, have declined 3 percent to 7 percent, with reductions occurring mainly in 1991 and 1993. These two carriers' retail rates were identical in 1989. Although their wholesale rates differed by 7 percent already in 1993. Since BACTC's reported rate reductions in 1993, retail rates differ on average by 6 percent.

The Sacramento market is an exception to the pattern of similar basic rates; rates in this market differ by 14 percent. This exception can be explained by the regulatory process. In 1988 both Sacramento carriers, Sacramento Cellular Telephone Company (SCTC) and Sacramento Valley Limited Partnership (SVLP), withdrew applications for identical rate increases of 50 percent for access charges, 40 percent for peak usage and 67 percent for off-peak usage. In 1989 SCTC received approval for a more modest rate increase. The CPUC is currently reviewing an SVLP application to raise rates to the same level as SCTC.

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3. Discount Plans

Discount plans offer modest rate relief to some consumers. We found that for most classes of customers in most urban markets the best rates offered through discount plans were lower than those offered by the basic rate. However, these rate reductions must be considered in the context of the difficult-to-quantify costs to consumers in terms of reduced flexibility, risk of termination fees and foregone access to emerging technologies. The analysis we undertook was unable to determine whether rates statewide went down as a result of the increased use of discount plans.[24] However, we did find that (1) in some California markets reported discount rates for low volume users are not lower than basic rates; (2) in most California markets the best available discount rate tracks very closely; and (3) carriers are anxious to sign consumers onto long term contracts, in part to keep them from changing to emerging technologies.

In California's largest and most expensive cellular market, Los Angeles, contract plans offer no rate relief to low use customers, according to carriers' reports. The best available reported rate for the Los Angeles 60 minute user is the duopolists' basic plan rate of $1.16 per minute. Medium users can find 10 percent discounts. High volume users, represented in our study by 480 minutes of use, are receiving by far the greatest discounts, 18 percent over basic rates. In Los

[24] To make any claim on the effect of discount plans on rates, the study would have to be based on a random sample of customer bills from California's major markets. In addition to usage patterns, this analysis would have to take into account the costs of any restrictions, such as term contracts, and the value of benefits, such as discounts on phones.

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Angeles discount plans appear to be structured to encourage greater cellular phone use.

Los Angeles Cellular Telephone Company - Best Rates

Minutes of Use	60	120	480
1989	1.16	0.79	0.51
1993	1.16	0.71	0.42

Los Angeles SMSA - Best Rates

Minutes of Use	60	120	480
1989	1.16	0.79	0.51
1993	1.16	0.71	0.42

Source: Carrier responses to CPUC and tariffs filed with the CPUC

While basic rates in San Francisco-Oakland-San Jose have begun to diverge, the best rate has remained close. The best blended rates for GTE and BACTC for low and medium users are within $0.001 per minute of each other.

Rate Comparisons - San Francisco MSA

Minutes of Use	60	120	480
Basic Plan			
BACTC	1.07	0.73	0.48
GTE	1.15	0.78	0.49
Best Rate			
BACTC	1.03	0.70	0.45
GTE	1.03	0.70	0.38

percentage of low use cell sectors declined to percent, while during the same time BACTC almost doubled its total number of cell sectors. Similar to the Los Angeles MSA, in the San Francisco MSA, percent of cell sectors are underutilized, with a capacity utilization rate of less than 80 percent.

These numbers indicate that GTE and BACTC have had widely differing available capacities in the last four years. GTE has maintained unused capacity in excess of 50 percent during the last four years, while BACTC has operated with a relatively low available capacity during these four years. Basic economic principles dictate that when excess capacity exists, prices in a competitive market should drop. Price comparisons between GTE and BACTC do not conform to this principle.

If prices were further reduced below the level associated with maximum capacity demand, as in the case of BACTC, then demand could be overstimulated beyond the available supply of calling capacity. To avoid service rationing or risk of service interruptions, it would be expected that BACTC would expand at an even higher rate. If GTE responded to competitive market conditions, it too would reduce prices to stimulate demand and use the relatively large available capacity it maintains.

Moreover, on a national basis, the national average density of systems, measured by subscribers per cell site, rose from 372 in December 1985 to 962 in

June 1992.[42] This increasing density does not indicate that capacity was constrained or that potential demand fully served through this period. Instead, these data indicate that additional customers could have been added to cellular systems had prices been lower. Accordingly, excess earnings cannot be explained away by spectrum scarcity or avoidance of service rationing.

The CPUC submits that the proliferation of "discount" plans, including volume discounts, is additional evidence that the carriers are not using their allocated spectrum to maximum capacity. Putting aside the question of whether discount plans truly provide discounts, it is obvious that the carriers are actively seeking to increase usage of existing spectrum capacity.

3. Spectrum Value

The high earnings of cellular carriers cannot be justified by virtue of the costs incurred for a FCC cellular license franchise. The CPUC concludes that the FCC license value, particularly for the larger California cellular markets, cannot be attributed merely to inherent scarcity of spectrum. The FCC license conveys the exclusive right to utilize particular frequencies of spectrum to sell cellular telecommunications services in a prescribed area. The license has a value to market traders at a level approximating the discounted present value of the rents flowing from entering the restricted market. The fact that cellular license values

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[42]National Telecommunications Industry Association, U.S. Spectrum Management Policy, 1991, Appendix D-6, note 17. As quoted in Congressional Budget Office, Auctioning Radio Spectrum Licenses, March 1992, p. 37.

years.[32] The second carrier in Los Angeles, Los Angeles SMSA , earned 37.9 percent annually on average over the same period. Bay Area Cellular Telephone Company in the San Francisco MSA had earnings that ranged from 31.1 percent in 1992 to 49.5 percent in 1993, with an annual average of 43.2 percent for the five years. AirTouch Communications in San Diego has earned an average of 28.3 percent per year for the last five years. These returns occurred during the worst recession in recent California history.

Other studies support our findings that high returns are the result of undue market power. Based on operating cost data provided by the Congressional Budget Office,[33] the fixed cost of establishing a cellular system at current technology is estimated at $10 per person per month.[34] The variable operating cost of providing cellular service to a subscriber is $10 a month. Marketing cost is estimated at $300 per new customer. The lowest monthly customer bill for a subscriber who uses 120 minutes per month, considered average, for the Los Angeles and San Francisco MSAs combined, is about $95.[35] Based on these cost estimates, the cellular carrier would earn $75 in operating profit for each new customer.

A similar study conducted for the FCC by Kwerel & Williams in 1992 also

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[32] See Appendix F.

[33] Congressional Budget Office, Auctioning Radio Spectrum Licenses, March 1992.

[34] The $10 is monthly fixed cost amortized over 10 years at 10 percent.

[35] Assumed at 80 percent peak and 20 percent off-peak use.

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because it gives the holder some control over its market.

> It is necessary to understand how the bidder would determine the price or the recipient would determine the value of the FCC license being acquired. In either case, one would calculate the earnings from the business which can be generated under the monopoly condition. These earnings would be greater than...under the competitive market structure and...associated solely with the ownership of the FCC license.[47]

Assuming that it is proper to impute spectrum value into earnings, McCaw disputes claims that celluiar carriers' earnings are excessive, Mc Caw presents pro forma earnings which purport to show that California cellular carriers' pre-tax rates of return would be below 25 percent if the investment base were increased to include a valuation for cellular spectrum at levels shown in its hypothetical scenarios. The CPUC finds McCaw's hypothetical earnings calculations to be based on a number of unproven, questionable assumptions that fail to show that excess earnings are not primarily attributable to market power and to spectrum scarcity.

One of the premises assumed in McCaw's calculations is that the cost paid to acquire SMR spectrum provides an equivalent measure of "uncontaminated" cellular license value free of excess profits due to market power. McCaw derives a value for SMR spectrum inferred from the acquisition by MCI of a 17 percent interest in Nextel, assuming this is a correct proxy for "uncontaminated" cellular spectrum value. However, before meaningful conclusions can be drawn regarding

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[47]"Declaration of Arthur A. Schoenwald in Opposition to Defendant's Motion for Summary Judgement and Adjudication of Issues," in Los Angeles Cellular Telephone Company vs. California State Board of Equalization, et. al., No. 509737 Superior Court, Sacramento, California.

"uncontaminated" spectrum value based on pro forma cellular rates of return adjusted for SMR proxy spectrum values, a much more involved analysis of the factors underlying cellular spectrum value would be required. The difficulty in quantifying a proper value for cellular spectrum and the impetus not to undertake such a resource-intensive study is one of the reasons the CPUC rejects cost-of-service regulation as a viable option for cellular carriers.

Moreover, even if the prices paid for SMR spectrum were assumed to constitute a correct reference point for "uncontaminated" cellular spectrum, it is not clear that McCaw's representation of a value of $42 per POP is necessarily ascribable only to SMR spectrum, as discussed earlier. Without further analysis of the terms and conditions of the MCI transaction, the CPUC cannot confirm whether there may be other intangible strategic benefits implied in the value paid by MCI for its ownership interest. For example, while McCaw states that MCI paid no control premium with only a 17 percent interest, MCI may have expected to realize some strategic advantage relative to later investors and incorporated this into its payment premium.

McCaw's adjustment of the SMR value of $42 per POP up to $100 per POP for the equivalent cellular spectrum is likewise questionable. McCaw bases this adjustment on the premise Nextel typically holds less than half the bandwidth of a cellular carrier. Yet, as discussed previously, the CPUC has concluded that control of a certain bandwidth frequency is not necessarily an accurate criterion for defining a carrier's market dominance. Many factors affect the price per POP